Filed 12/27/13 Brewster v. Hewlett CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ARTHUR J. BREWSTER, Plaintiff and Appellant, v. AUSTIN HEWLETT, Defendant and Respondent.	G048079 (Super. Ct. No. 30-2011-00504469) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed.

Cary S. Macy for Plaintiff and Appellant.

Greer & Associates, C. Keith Greer and Jonathan M. Berger for Defendant and Respondent.

Arthur J. Brewster appeals from the judgment in his medical malpractice action against Austin Hewlett arising out of an ankle surgery. The jury returned a special verdict against Brewster finding Hewlett was not negligent. Brewster raises numerous issues on appeal. None have merit, and we affirm the judgment.

FACTS[1] & PROCEDURE

Plaintiff's Case

In 2009, 78-year-old Brewster was referred to Hewlett, a podiatrist, due to extreme pain in his right ankle. Brewster had severe arthritis in the ankle due to a 1991 ankle fracture. Brewster also suffered from severe bowleggedness. Brewster and Hewlett discussed the possibility of an ankle arthrodesis, a procedure whereby the ankle joint would be fused to the tibia. The goal of ankle fusion surgery is to align and then fuse the ankle to the tibia (the large bone in the lower part of the leg) to produce a plantigrade foot (i.e., the entire sole of the foot touching the ground). Brewster testified that when he met with Hewlett, Hewlett told him the surgery would result in a pain-free plantigrade foot. Brewster testified Hewlett never discussed the effect any off-center alignment of the ankle with the tibia (due to the bowleggedness) would have on his knee, and he did not and would not have consented to any such off-center alignment.

After the surgery, Brewster had extreme pain when he tried to walk on the foot, and it would not go flat. Hewlett assured Brewster it would eventually flatten and recommended orthotics. Brewster was eventually referred to an orthopedic surgeon, Steven Ross. Ross determined Brewster's ankle and the joint below it, the subtalar joint, had both become rigid and fused to the tibia. That rigidity, combined with Brewster's bowleggedness, was causing significant overload on the outside of the foot. He took

---

[1] Because on appeal, Brewster largely challenges the sufficiency of the evidence to support a defense verdict, we detail the evidence in the light most favorable to the judgment. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

further X-rays showing the tibia misalignment 10 to 17 percent off center. Ross performed a second surgery, correcting the misalignment of the tibia, but he could not correct the rigidity in the subtalar joint.

Brewster's expert witness, Steven Graboff, was an orthopedic surgeon but was not a foot and ankle specialist. He testified that in an ankle fusion surgery there should be no involvement of the neighboring subtalar joint. Brewster's medical records showed that prior to the surgery, he had 75 percent mobility in the subtalar joint, but after the surgery he had no motion in the joint. Graboff testified some of the postoperative X-rays he viewed show the screw that was placed to fuse the ankle joint to the tibia crossed into the subtalar joint, fusing it as well, but he conceded other X-rays did not show the screw crossing into the subtalar joint.

Graboff testified fusing both the ankle joint and the subtalar joint prevented Brewster from compensating for his bowleggedness when he walked. He explained the problem as follows. Because Brewster was bowlegged, placing his leg and foot in a varus position, he would normally compensate by bending his foot into a valgus (or everted) position to make it go flat (the knee wants to go out so the ankle bends in to correct and force the foot flat). The ability to evert the foot comes 90 percent from the subtalar joint. But here Hewlett fused the ankle in line with the tibia, instead of compensating for the varus position, and then fused both the ankle and the subtalar joint making it impossible for Brewster to bend the ankle to compensate for the bowleggedness. This kept his weight on the outside of the foot, which in turn significantly affected Brewster's knee. Ross's surgery realigned the tibia, so Brewster could now walk flat.

Graboff testified Hewlett breached the standard of care in several ways: (1) he did not obtain Brewster's informed consent to do a subtalar fusion; (2) he did not obtain Brewster's informed consent for the ankle fusion surgery because he did not discuss the effect of his bowleggedness on the knee and ankle; (3) he did not conduct a

full biomechanical analysis of Brewster's entire leg to understand the effect of his bowleggedness so as to adequately compensate for it when aligning the foot to the tibia; (4) he misaligned the ankle with the tibia during the surgery; (5) he violated the subtalar joint with the screw causing fusion of the subtalar joint; (6) he failed to recognize the misalignment problem postoperatively; (7) he failed to diagnosis the subtalar fusion postoperatively; and (8) he failed to treat the post-operative conditions. Graboff testified postoperative use of orthotics would not have corrected the problems.

Ross testified he performed a second surgery on Brewster to correct tibia misalignment, which eventually resulted in his foot going flat. Brewster was not currently a candidate for knee replacement surgery. Ross obtained full-leg X-rays before doing the second surgery. Ross testified he never diagnosed Brewster as having had his subtalar joint fused, but it had become rigid. Ross testified several things could have caused subtalar joint rigidity including: arthrofibrosis; scarring around the joint; the loss of cartilage; inflammatory arthritis; and posttraumatic arthritis. Ross testified that during his care and treatment of Brewster, he never formed an opinion regarding whether Hewlett breached the standard of care.

Defense Case

Hewlett testified he first examined Brewster in 2003 for lower extremity skin lesions and was aware even then of Brewster's bowleggedness. He did not see Brewster again until September 2009 for pain in his right ankle. Brewster had badly fractured the ankle in 1991 and had surgery, but Brewster thought it was "set wrong." Brewster had a guarded range of motion and largely walked on the ball of his right foot. Brewster also had an ulcer on his right sole, porokeratosis palmaris at plantaris disseminata (a very rare skin condition), a lot of arthritis, metatarsalgia, and talipes cavus.

Hewlett developed a treatment plan that included first having a CAT scan X-ray done on Brewster's right ankle, a pressure relief shoe, closure of the plantar ulcer,

and discussing ankle fusion. The X-ray taken in October 2009 revealed extensive ankle joint damage and arthritis—in short, "it was not a good-looking ankle or foot."

Brewster returned to Hewlett in January 2010, and they discussed performing an ankle fusion. They had informed consent discussions, and Brewster executed an informed consent form for a right ankle joint arthrodesis. Hewlett discussed the ankle fusion procedure and explained to Brewster that "he had a very bad ankle" with loose bodies floating around a joint with no cartilage left and no space between the bones; it was "not a good joint." Hewlett was very aware of Brewster's bowleggedness, but when he tried to discuss it with Brewster, Brewster "shrugged it off." Hewlett discussed which joints would be fused, the postoperative course, and the possible risks and complications of joint fusion, which included that he would have time off his foot, the procedure might not work, he might need additional or different foot or ankle surgery, there might be an overcorrection of the deformity or recurrence of condition, the condition might worsen, he might need removal of surgical implants, and there could be significant chronic pain. Brewster signed an informed consent form confirming all of his questions were answered to his satisfaction and the form included a skeletal diagram of a foot detailing the procedure. Hewlett explained to Brewster there were no guarantees of a good outcome to the surgical procedure.

The surgery was performed on March 17, 2010. Because the angle of Brewster's tibia was not normal due to his bowleggedness, during the operation Hewlett recreated a normal standing position using a surgical tray to line up the ankle with the tibia and then fused the ankle so the foot was on plantar grade (i.e., flat) against the tray. During the surgery, Hewlett confirmed the screws did not impact any adjacent joints, including the subtalar joint, and took X-rays during the surgery to confirm the position of the screws and the foot. After the ankle was fused, there was a shift in the angle of the ankle, caused by a gap, which Hewlett then packed with bone graft. Hewlett did not fuse the ankle "at a crooked angle to offset [Brewster's] bowleggedness" because he

understood there was a high probability Brewster would need knee surgery in the future. The goal here was to give Brewster a foot he could walk on without pain. Hewlett believed after surgery Brewster's foot would settle down to come in contact with the floor and it was his experience anyone with life-long bowleggedness would have compensatory patterns that would also relax after the surgery allowing the foot to settle into position.

Brewster had a normal course of recovery, which included various casts below the knee and immobilization. He was allowed to start walking on the foot on June 14, 2010. At a follow-up appointment on August 19, 2010, Brewster said he was doing well and able to walk up stairs without pain. Hewlett released Brewster to begin weight bearing in normal shoes.

Brewster returned to Hewlett on October 28, 2010, complaining of extreme pain when walking and difficulty standing for an extended period. He was concerned his ankle was "crooked," and he felt like he was walking on the outside of his foot. Hewlett believed "things [were] going mostly pretty good, that things were coming down, that the forefoot was basically getting on the ground, [and] staying there . . . except for the fact that he was still in pain, I thought things were going pretty good." He based his conclusion in part on the fact Brewster had developed a callus under the first metatarsal head, which indicated his foot position was improving and Brewster was not being forced to walk on the outside of his foot due to the angle of his ankle. Hewlett told Brewster he needed to be fitted for orthotics to aid in foot position and which Hewlett believed had a high probability of aiding Brewster's recovery. Hewlett obtained authorization for orthotics and additional X-rays, and scheduled Brewster for a recheck in two weeks, but Brewster did not return.

Kendall Wagner testified as Hewlett's expert witness. Wagner was an orthopedic surgeon who specialized in the foot and ankle. Wagner testified that based on his review of Brewster's X-rays and Wagner's knowledge of anatomy, it was "virtually

impossible" the screw placed to fuse the ankle to the tibia had "violated the subtalar joint." Brewster's subtalar joint was not normal even before the surgery. It was grossly arthritic already due to the fracture in 1991 and he already had large bone spurs. Wagner testified an ankle fusion surgery is extremely complicated and difficult and has a long recovery time. He explained that when one joint is fused, the surrounding joints take on additional stress and wear.

Wagner testified fusing the ankle in anatomical alignment with the tibia as Hewlett had done was not below the standard of care. He strongly disagreed with Graboff's opinion on this issue. Wagner explained Brewster already had severe arthritis in his right knee and it was worse on the medial side (inside) of the knee making him bowlegged with his leg in the varus position and the tibia off by about 10 degrees. Graboff's suggested alignment could have made Brewster worse off, particularly since his knees were likely to get worse and eventually need to be replaced. If Hewlett had fused the ankle with the foot in the valgus position, as Graboff suggested, it would have significantly limited the ability to do a knee replacement later. In a knee replacement, the tibia and the femur have to be aligned. Had the foot been fused as Graboff suggested, the ankle would have had to be redone to accomplish a knee replacement, something that would have been very difficult to do. Wagner opined it was completely reasonable for Hewlett to fuse the ankle in the alignment he chose and plan to accommodate the 10 degrees later with orthotics to decrease loading on the outside of the foot. Wagner testified orthotics would have been successful in making postoperative corrections.

Wagner testified Hewlett had completely satisfied the standard of care by properly discussing orally, and through a written consent form, all the risks and complications associated with the procedure, which included a failure of the procedure, over correction of deformity or reoccurrence of the condition, worsening of the condition/disability, and significant/chronic pain. Wagner opined Hewlett's care and treatment of Brewster met the standard of care at all times. Hewlett's recommendation of

ankle fusion was appropriate in light of Brewster's chronic ankle pain and difficulty walking. Hewlett properly assessed Brewster preoperatively, and although Wagner usually took full leg X-rays before performing an ankle fusion surgery, the standard of care did not require them—the X-rays taken by Hewlett satisfied the standard of care. Wagner opined the surgery was performed within the standard of care. Hewlett's screw placement during the surgery was appropriate and did not compromise the subtalar joint, i.e., Hewlett did not surgically fuse the subtalar joint. The ankle-tibia alignment made by Hewlett was appropriate.

Procedure

Brewster's complaint contained a single cause of action for medical negligence. The jury returned two special verdict forms in favor of Hewlett. On the first form, the jury found Hewlett was not negligent in Brewster's "diagnosis or treatment," and on the second form titled "medical negligence--informed consent" the jury found Brewster gave his informed consent for the ankle fusion surgery. Judgment was entered for Hewlett, and Brewster's motions for new trial and for judgment notwithstanding the verdict were denied.

DISCUSSION

Although Brewster's opening brief contains 10 separately briefed issues, they may be grouped as four: (1) the verdict is not supported by substantial evidence; (2) there were instructional errors; (3) the special verdict form was defective; and (4) the trial court erred by denying his motion for a new trial. Before addressing the issues, we find it useful to reiterate oft-stated rules of appellate review.

"California appellate courts are generally constrained by three principles of appellate review: First, the trial court's judgment is presumptively correct, such that error must be affirmatively demonstrated, and where the record is silent the reviewing court will indulge all reasonable inferences in support of the judgment. [Citations.] This means that an appellant must do more than assert error and leave it to the appellate court

to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to supporting authorities and to relevant portions of the record. [Citations.] Of course this also means that during trial, the parties must ensure that an adequate record is made of errors by which they are or may be aggrieved; ordinarily, errors not reflected in the trial record will not, and indeed cannot, sustain a reversal on appeal. [Citations.] [¶] Second, findings must be sustained if they are supported by substantial evidence, even though the evidence could also have justified contrary findings. [Citations.] When combined with the foregoing principle this means that an appellant who challenges a factual determination in the trial court—a jury verdict, or a finding by the judge in a nonjury trial—must marshal *all* of the record evidence relevant to the point in question and affirmatively demonstrate its insufficiency to sustain the challenged finding. [Citation.] [¶] Third, even if error is demonstrated it will rarely warrant reversal unless it appears 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.] This means the appellant must show not only that error occurred but that it is likely to have affected the outcome." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557).

Our review is severely constrained by the record Brewster has provided. Brewster proceeded by way of an appellant's appendix (Cal. Rules of Court, rule 8.124), that contains only the complaint (and not the answer), the completed special verdict forms, the judgment, Brewster's new trial motion and the opposition, and the minute order denying the new trial motion. None of the jury instructions (given or refused) are provided. The 300-page, one-volume reporter's transcript designated by Brewster specifically states it *does not* include the testimony of *all* witnesses; Brewster requested only the testimony of the five witnesses detailed above (i.e., Graboff, Ross, Brewster, Hewlett, and Wagner) be included. And although California Rules of Court, rule 8.130(a)(2), requires that if an appellant designates "less than all the testimony, the

notice must state the points to be raised on appeal" and the appellant is limited to those points, Brewster gave no such notice. Because there are no minute orders from the trial in the record, we do not know what other witnesses testified at trial, but the reporter's transcript we have indicated Brewster's wife testified and her testimony was omitted from the appellate record. There is no reporter's transcript of the opening and closing arguments. Brewster did not include any exhibits in his appellant's appendix, and has not requested that any be transmitted to us. (Cal. Rules of Court, rule 8.224.)

1. Substantial Evidence Issues are Waived

Brewster's first two briefed issues are: (1) Hewlett failed to get informed consent for fusing Brewster's ankle *and* subtalar joint; and (2) Hewlett's failure to obtain full-leg X-rays before surgery constituted negligence. We construe both issues as substantial evidence issues and due to the lack of an adequate record, both are waived.

An appellate court must resolve the issue of substantial evidence in "light of the *whole record*." (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) Brewster failed to provide us with the *whole record*—he has given us only a partial reporter's transcript of the oral proceedings. His wife's testimony was omitted from the record on appeal. There are significant risks in providing an incomplete record of oral proceedings. "Particular care must be taken in deciding whether to designate a partial reporter's transcript or none at all. [¶] Absence of a record of the oral proceedings (a) bars appellant from claiming the evidence was insufficient to support the judgment or raising any other evidentiary issues and (b) also precludes a determination that the trial court abused its discretion. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶¶ 4:44 to 4:45, pp. 4-11 to 4-12; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 ["To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error"].) Where the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Moreover, even if the substantial evidence arguments were not waived, as we explain below, based on the partial record we have, we are satisfied substantial evidence supports the special verdicts. "'When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment.' [Citation.] In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" (*Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 113-114 (*Quintanilla*).)

a. Informed Consent

A claim for failure to obtain informed consent arises out of "a physician's duty to disclose to a patient information material to the decision whether to undergo treatment[.]" (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1175 (*Arato*).) Material information is "'information which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject a recommended medical procedure.'" (*Id*. at p. 1186.) The physician also must disclose to the patient "'such additional information as a skilled practitioner of good standing would provide under similar circumstances.' [Citation.]" (*Id.* at p. 1190.) "If a doctor fails to make reasonable disclosure and a prudent person in the patient's position would have declined the procedure had disclosure been made, then the doctor may be held liable in negligence if the risks inherent in the procedure materialize.

[Citation.]" (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 339.) "[T]he existence of informed consent is an issue of fact for the jury[]" (*Quintanilla, supra,* 133 Cal.App.4th at p. 115), that we must affirm if supported by substantial evidence.

Substantial evidence supports the jury's finding Brewster gave informed consent to his treatment. The gist of Brewster's informed consent argument is that Hewlett did not adequately disclose the effect of Brewster's bowleggedness—specifically, that he planned on fusing the ankle in alignment with the tibia so that the foot would be off center pushing his weight to the outside of the foot, and then he fused not only the ankle but the subtalar joint as well (a procedure he had not authorized) so he now could not evert the ankle (i.e., bend outward) to get his foot in a plantigrade position. But Hewlett testified he planned and disclosed to Brewster a surgery that should have resulted in plantigrade foot and he did not surgically fuse the subtalar joint. Hewlett anticipated the foot would naturally settle down to a plantigrade position, and he would have used orthotics to assist with that process. Wagner, an orthopedic surgeon specializing in the foot and ankle, opined Hewlett's plan and execution of the procedure was within the standard of care. Wagner explained it was virtually impossible Hewlett had surgically fused the subtalar joint—the screw placed to fuse the ankle did not violate the subtalar joint. Ross testified he never diagnosed Brewster as having had his subtalar joint fused, but it had become rigid. Ross testified several things could have caused subtalar joint rigidity including: arthrofibrosis, scarring around the joint, the loss of cartilage, inflammatory arthritis, and post-traumatic arthritis. Wagner testified Hewlett had "completely satisfied" the standard of care required for informed consent.

b. Full-Leg X-rays

Brewster also argues it was negligent for Hewlett to have not obtained full-leg X-rays before surgery and all experts agreed his failure to do so was negligence. His argument is completely unsupported by legal analysis or any supporting authority. Furthermore, it ignores the evidence supporting the jury's finding. Ross testified he

always took full-leg X-rays, but specifically had no opinion on whether Hewlett breached the standard of care. Wagner testified Hewlett properly assessed Brewster preoperatively, and although Wagner would have taken full-leg X-rays before the surgery, the standard of care *did not* require them and the X-rays taken by Hewlett satisfied the standard of care.

2. Instructional Errors

Brewster raises three issues we construe as claims of instructional error including: (1) the verdict is inconsistent with the law because the trial court failed to instruct the jury on res ipsa loquitur; (2) he was prejudiced by CACI Nos. 501 and 533; and (3) the court failed to instruct on battery. His complaints are waived.

a. Res Ipsa Loquitur

Brewster argues the trial court should have granted his motion for new trial (Code Civ. Proc., § 657)[2] because it failed to instruct the jury on res ipsa loquitur (Evid. Code, § 646), a presumption he argues plainly applied in this case.[3] Brewster never requested jury instructions on res ipsa loquitur. A party "may not complain of the

---

[2] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[3] "The doctrine of res ipsa loquitur is too familiar to warrant a lengthy explanation. In brief, certain kinds of accidents are so likely to have been caused by the defendant's negligence that one may fairly say 'the thing speaks for itself.'" (*Brown v. Poway Unified School District* (1993) 4 Cal.4th 820, 825 (*Brown*).)

"In California, the doctrine of res ipsa loquitur is defined by [Evidence Code section 646, subdivision (b)] as 'a presumption affecting the burden of producing evidence.' [Citation.] The presumption arises when the evidence satisfies three conditions: '"(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."' [Citation.] A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. [Citations.]" (*Brown, supra,* 4 Cal.4th at pp. 825-826.)

failure to instruct on a particular issue where he or she has not requested a specific, proper instruction. (*Alvarez v. Felker Mfg. Co.* (1964) 230 Cal.App.2d 987, 1001 (*Alvarez*).) Indeed, this argument was not raised as a ground for new trial—it was not mentioned in Brewster's moving papers, and apparently surfaced for the first time in Brewster's reply to Hewlett's opposition to the new trial motion (which is not in our record) and was disregarded by the trial court. Accordingly, we treat the point as waived.

b. CACI Nos. 501 and 533

Brewster contends he was prejudiced by CACI Nos. 501 and 533. Again, the arguments are waived.

The instructions given to the jury are not in the record on appeal. The form CACI No. 501 instructs a jury that a "[*insert type of medical practitioner*] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of medical practitioners*] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as 'the standard of care.'" Additionally, it instructs the jury it must determine the standard of care "based only on the testimony of the expert witnesses including [*name of defendant*] who have testified in this case." Brewster contends the instruction should not have been given because Hewlett's negligence in failing to take a full-leg X-ray was a matter of common knowledge.

CACI No. 533 instructs the jury on the factual elements for a claim of failure to obtain informed consent. The form instruction requires the name of the medical procedure be inserted into the instruction. Brewster contends that as given, the instruction stated, "'Hewlett was negligent because he performed an ankle fusion on [him] without first obtaining his informed consent . . . .'" Brewster argues the jury should also have been instructed he claimed Hewlett "fused his subtalar joint without first obtaining his informed consent."

Again, the jury instructions are not in the record and there is nothing in the record indicating which party proposed these instructions. The only mention of jury instructions in the record before us is the following directive from the trial court given to both counsel: "With respect to the jury instructions, I expect counsel to get together, work out the jury instructions together. And I will only rule on those jury instructions over which there is an objection; otherwise *I will presume they're being jointly submitted*. Also, the same goes with the jury verdict." (Italics added.)

Parties raising claims of instructional error on appeal bear the burden of providing the court with a record sufficient to support those claims. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678 (*Bullock*).) To be sufficient, the record must "establish that the claimed error was *not* invited by" the appellant. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1091 (*Mayes*).) Accordingly, reviewing courts will not consider claims regarding errors in jury instructions where the record does not show who requested the instructions. (*Faulk v. Soberanes* (1961) 56 Cal.2d 466, 471.) Under the invited error doctrine, where the record does not disclose which party requested an allegedly erroneous instruction, "the reviewing court must presume that the appellant requested the instruction and therefore cannot complain of error. [Citation.]" (*Bullock, supra*, 159 Cal.App.4th at p. 678.) Here, because we have no record as to which party requested the instructions, Brewster has failed to provide a record sufficient to establish that he did not invite error with respect to these instructions and he is barred from complaining about them on appeal. (See *Mayes, supra,* 139 Cal.App.4th at p. 1091.)

c. Battery

Brewster contends Hewlett's performing a subtalar joint fusion without his consent constituted a medical battery and, therefore, the trial court erred by failing to instruct the jury on medical battery. The contention is waived. Brewster's complaint did not plead a cause of action for medical battery, only for medical negligence. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324-325 [medical battery and lack of informed

consent separate causes of action].) More importantly, there is nothing in the record indicating Brewster ever requested the jury be instructed on medical battery. (*Alvarez, supra,* 230 Cal.App.2d at p. 1001 [party may not complain of failure to instruct where he has not requested instruction].)

3. Special Verdict Form

Brewster's seventh and ninth issues are the same. He contends the special verdict form pertaining to informed consent was "fatally defective" because it did not require the jury to answer the separate and distinct question of whether Hewlett performed a subtalar joint fusion without informed consent.

The only record concerning which party prepared the special verdict forms is the trial court's comment directing counsel to prepare one together, and unless there were objections, it would presume it was jointly submitted. There are no objections to the special verdict form in this record. Because the special verdict form was presumably prepared jointly, the doctrine of invited error would preclude Brewster from now claiming the special verdict form was defective. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1687 [party could not claim jointly drafted special verdict form resulted in inconsistent verdict].)

Furthermore, even if the special verdict form was prepared by Hewlett, Brewster's failure to object waives the issue on appeal. "A party who fails to object to a special verdict form ordinarily waives any objection to the form." (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530.) Where, as here, the issue is whether a question was omitted from a special verdict form, the objection must be raised before the jury is discharged. (*American Modern Home Ins. Co. v. Fahmian* (2011) 194 Cal.App.4th 162, 170, fn. 1.) To preserve the objection for appeal, a party must either object to the allegedly defective special verdict form in the trial court or propose its own verdict form containing the question or questions the party contends were improperly omitted. (See *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 276-277.)

Brewster's failure to do so waives the issue on appeal. (*Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521, fn. omitted ["Failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected"]; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 858 ["where the record is devoid of any showing that appellant[] objected to the special verdict questions, any inherent error therein is waived"].)

4. New Trial Motion

Brewster contends the trial court erred by denying his motion for new trial.[4] Brewster sought a new trial on the grounds there was insufficient evidence to justify the verdict (§ 657, subd. (6)), and there was newly discovered evidence (§ 657, subd. (4)). The newly discovered evidence was that "Brewster . . . is now required to get a hip replacement because of [Hewlett's] negligence." The motion referred to a declaration from Brewster. The copy of Brewster's declaration contained in the appellant's appendix is essentially blank—it simply contains the statement Brewster has personal knowledge of the matters set forth in the declaration, followed by a two-inch blank spot, followed by a declaration that it was signed under penalty of perjury and Brewster's signature. Hewlett objected to Brewster's declaration as inadmissible hearsay.

The trial court denied Brewster's motion for new trial. It found, "There was, in fact, ample evidence on which a jury could have found [Hewlett] not liable. . . . Wagner testified that . . . Hewlett's care and treatment of [Brewster] met the required standard of care and that the surgery was appropriately done. Furthermore, . . . Hewlett testified that he intended to make additional adjustments with custom orthotics, but

---

[4] Hewlett contends the order is not appealable. Although the order is not separately appealable, it may be reviewed on an appeal from the judgment. (§ 906; *Scott v. Farrar* (1983) 139 Cal.App.3d 462, 465, fn. 1.)

[Brewster] left . . . Hewlett's care before that point. [¶] [Brewster] admitted that he had read the consent form and understood the risks." The court ruled Brewster's declaration was inadmissible hearsay because he "is stating what he understands his doctor to have told him regarding the [hip] surgery."

The granting or denial of a new trial is a matter resting largely in the discretion of the trial court. (*People Ex REL. Dept. Pub. Wks. v. Brusati* (1963) 223 Cal.App.2d 643, 646.) Brewster has not demonstrated an abuse of discretion with regard to the newly discovered evidence claim. The trial court ruled Brewster's declaration was inadmissible hearsay. Brewster has offered no cogent argument that ruling was in error, and in any event, he has not provided us with a record (i.e., the actual declaration) on which we could review any such claim.

Nor has Brewster demonstrated the court erred by denying a new trial due to insufficient evidence. Section 657 states: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." "A trial court has broad discretion in ruling on a new trial motion, and the court's exercise of discretion is accorded great deference on appeal. [Citation.] An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence or excessive damages only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) Brewster has not shown an abuse of discretion. As

the trial court observed, there was substantial evidence supporting the jury's verdict in Hewlett's favor; that evidence has been detailed above, and we will not repeat it here.

Brewster separately argues the trial court erred by denying the new trial motion before the record of the trial was transcribed. He cites to California Constitution, article VI, section 13, which requires "examination of the *entire* cause" (italics added), before a miscarriage of justice can be found, and *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872, which states that in reviewing an order denying a new trial the reviewing court must "review[] the *entire* record, including the evidence . . . ." (Italics added.) Brewster's argument is frivolous. He was the moving party and he makes no showing he requested a transcript of the trial proceedings prior to the hearing. Moreover, a new trial motion must be (and was) heard by the judge who presided at trial (§ 661), and the trial court may be expected to rely upon its own recollection of the evidence because the trial took place entirely in its presence. In effect, "[t]he trial judge sits as the thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.) There simply is no authority for Brewster's contention a full reporter's transcript must be provided for the trial judge to consider and reweigh the evidence he or she has already heard.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.